

Bruce F. Fain  
Murphy, Kirkpatrick & Fain, P.L.L.P.  
208 North Broadway, Suite 208  
P.O. Box 429  
Billings, MT 59103-0429  
Phone: (406) 256-9700  
Fax: (406) 256-9755  
E-mail: bruce@murphkirk.com  
I.D. Number: 3377

Attorneys for Plaintiff  
Auto Auction of Montana

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MONTANA

In re:

INCREDIBLE AUTO SALES, LLC,  
  
Debtor.

CASE NO. 06-60855

Adversary No. 06-00119

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AUTO AUCTION ASSOCIATES OF  
MONTANA, INC., D/B/A AUTO  
AUCTION OF MONTANA A/K/A AUTO  
AUCTION OF BILLINGS,

Plaintiff.

v.

INCREDIBLE AUTO SALES, LLC,  
  
Defendant.

**MOTION FOR RECONSIDERATION RE:  
TEMPORARY RESTRAINING ORDER**

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**MOTION**

AUTO AUCTION ASSOCIATES OF MONTANA, INC., D/B/A AUTO AUCTION

OF MONTANA A/K/A AUTO AUCTION OF BILLINGS ("Auto Auction"), respectfully moves that the Court reconsider its decision of October 20, 2006 wherein the Court did not issue the requested TRO, apparently on the basis that a "bond" had not been provided. The grounds for this request is that the Court may have applied the wrong standard in that the Court apparently ruled that a bond must be filed at the time of the request for a TRO, rather than if and when the Court determines an appropriate amount of a bond.

Without the issuance of a TRO the Debtor will presumably continue to attempt to sell the Vehicles which are the subject of Auto Auction's reclamation claim. This will seriously impair, if not eliminate any rights of Auto Auction which are expressly recognized by Section 546(c) of the Bankruptcy Code.

Further grounds for this motion appear in the brief set forth below.

#### **BRIEF**

Rule 7065 of the Bankruptcy Rules of Procedure incorporate the injunctive relief provisions of Rule 65 of the Federal Rules of Civil Procedure. Rule 65 of the Federal Rules of Civil Procedure provides in pertinent part that:

Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

Fed.R.Civ.P. 65(c).

The Ninth Circuit Court of Appeals has recognized that the amount of security is left up to the discretion of the District Court. *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9<sup>th</sup> Cir. 1999). In deciding that the decision was subject to an abuse of discretion standard the *Barahona-Gomez* Court noted:

Our sister circuits have construed Fed.R.Civ.P. 65(c) as investing the district court with discretion as to the amount of security required, if any. See, e.g., *Doctor's Associates, Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir.1996) (affirming district court's decision not to require bond); *Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F.3d 1171, 1176 (6th Cir.1995) (district court has discretion to require posting of security); *Stockslager v. Carroll Elec. Co-op. Corp.*, 528 F.2d 949, 951 (8th Cir.1976) (amount of bond required upon the issuance of a preliminary injunction vests within the sound discretion of the trial court and will not be reversed on appeal unless there is a clear abuse of discretion).

*Id.* Significantly, the Court expressly approved of *Doctor's Associates, Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir.1996), where the Court approved a district court's decision to not require the posting of any bond at all.

The language of Rule 65(c) states that the security is to be "In such sum as the court deems proper . . . ." As noted by the Ninth Circuit, this permits the Court the discretion as to the amount of the bond and to even decide no bond is required.

In this case, Auto Auction is even now attempting to work out a stipulation which will avoid the need for a hearing on injunctive

relief. Documents have been provided to counsel for the Debtor and to counsel for the Debtor's flooring lender<sup>1</sup>. There has been no resolution as of the filing of this motion, so the motor vehicles are still on the Debtor's lot and still subject to sale by the Debtor. Without a TRO the Debtor will undoubtedly continue to attempt to sell the units, and such sales may very well eliminate any rights Auto Auction may have under Section 546(c). At the very least, sales of these particular units will increase the complexity of the issues confronting the Court.

Auto Auction is prepared to post a bond if the Court determines one is necessary. Auto Auction has an application prepared and will only need to know the amount of the bond. Logistically, issuance may be difficult due to the lateness of the day, so at a minimum, the Court should issue a TRO which immediately prohibits the Debtor from selling, encumbering, transferring or disposing the Vehicles and which permits Auto Auction to file the bond no later than Monday, October 23, 2006.

Auto Auction is simply wanting to maintain the status quo during the until such time as its claim can be resolved. The only

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<sup>1</sup>To the best of counsel's knowledge, at the time of the filing of this motion, counsel for the flooring lender has not been made a party in this adversary proceeding or requested notice in this particular adversary proceeding. It is counsel's understanding that the flooring lender is preparing a motion to intervene, and Auto Auction has no objection to permitting the intervention (but Auto Auction does dispute the lender has a claim to the Vehicles superior to Auto Auction).

way to maintain the status quo is to temporarily restrain the Debtor from encumbering, selling, transferring or disposing of the Vehicles.<sup>2</sup>

Wherefore, Auto Auction respectfully requests that the Court:

1. Issue a TRO which immediately prohibits the Debtor from selling, encumbering, transferring or disposing of the Vehicles previously identified on Exhibit A and A-1 in Auto Auction's previously filed pleadings;

2. Notes in the TRO that no bond is required for the TRO to be effective, but if a bond amount is set, make the TRO immediately effective, but note it will be dissolved without further action if Auto Auction does not file a bond, in an amount the Court deems appropriate, no later than 5:00 p.m. on October 23, 2006.

DATED this 20th day of October, 2006.

Murphy, Kirkpatrick & Fain, P.L.L.P.  
208 North Broadway, Suite 208  
P.O. Box 429  
Billings, MT 59103-0429

By: /S/ Bruce F. Fain  
Bruce F. Fain  
Attorneys for Plaintiff Auto  
Auction of Montana

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<sup>2</sup>The TRO motion previously requested that the Court require Auto Auction to be listed as an additional loss insured on the Vehicles. It appears that language is no longer necessary and that coverage can be obtained by Auto Auction, as long as it knows the location of the Vehicles in order to add the location to its policy.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 20th day of October, 2006, a copy of the MOTION FOR RECONSIDERATION RE: TEMPORARY RETRAINING ORDER was served upon counsel of record by the following method:

1,3,4      CM/ECF  
\_\_\_\_\_  
            Hand Delivery  
\_\_\_\_\_  
            Mail  
\_\_\_\_\_  
            Overnight Delivery Service  
  2        Fax  
  4        E-Mail

- 1.\_\_\_\_ William L. Needler  
William L. Needler and Associates  
555 Skokie Blvd. Ste. 500  
Northbrook, IL 60062
2.        Nick Gutierrez  
Incredible Auto Sales, LLC  
1832 King Avenue West  
Billings, MT 59102
3.        Neal Jensen  
U.S. Trustee  
Liberty Center, Ste. 204  
301 Central Ave.  
P.O. Box 3509  
Great Falls, MT 59403
4.        Charles W. Hingle  
Shane Coleman  
P.O. Box 639  
Billings, MT 59103-0639  
[chingle@hollandhart.com](mailto:chingle@hollandhart.com)

\_\_\_\_\_/S/ Bruce F. Fain